Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Rogers Communications Inc., 2013 OHSTC 7

Date: 2013-02-06
Case Nos.: 2011-54 and 2011-58
Rendered at: Ottawa

Between:

Rogers Communications Inc., Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against two directions issued by a health and safety officer.
Decision:	The directions are rescinded.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	William Duvall and Thora Sigurdson, Counsel, Fasken Martineau duMoulin, LLP

REASONS

[1] This appeal has been brought by Rogers Communications Inc. (Rogers) under subsection 146(1) of the *Canada Labour Code* (the Code) to challenge two directions issued to Rogers by Health and Safety Officer (HSO) Betty Ryan on September 22 and October 28, 2011. Both directions were issued to Rogers pursuant to subsection 145(1) of the Code for having contravened paragraphs 125(1)(l), (w) and (z.14) of the Code and relevant provisions of the *Canada Occupational Health and Safety Regulations* (the Regulations).

[2] The directions followed the HSO's investigation into a work-related accident that occurred on September 8, 2011, where an employee of Luktor Contracting Inc. (Luktor), a construction firm whose services had been retained by the appellant to install certain equipment on the roof of a building situated at 206 East 49th Avenue, Vancouver, British Columbia, where Rogers already had communications equipment in place, was injured in a fall from the side of the building.

[3] While the two directions were appealed separately by the appellant, Rogers sought to have the two appeals consolidated for hearing and determination since both originated from the same facts and circumstances. That request was granted by appeals officer Michael Wiwchar on November 29, 2011.

[4] There has been no *in persona* hearing of the present appeal which is thus being determined solely on the basis of HSO Ryan's investigation report, the evidence submitted by the appellant through an affidavit of Alex Vlach, civil project coordinator for Rogers, said affidavit being supported by some 44 documents, the information obtained from HSO Ryan on the occasion of a telephone conference held by me with the latter and counsel for the appellant on April 11, 2012, and the submissions presented by counsel for the appellant. No party has come forth to oppose these appeals.

Background

[5] While the issues raised by these appeals may appear to present some complexity, the facts that serve as background to the matter at hand are quite simple and straightforward. As stated above, on September 8, 2011, Mr. René Landry, a labourer in the employ of Luktor Contracting Inc. was in the process of installing a cable at the side of the building described as 206 East 49th Avenue, Vancouver, as part of the tasks required by a Work Order between Luktor and Rogers relative to the installation of a telecommunications tower on the roof of said building.

[6] According to the HSO report, nine persons were working at the site at the time of the accident, but none were employees of Rogers. The accident occurred when a labourer working on the roof who was using a "grinder to get at a cable inside a conduit" accidentally cut the line holding the bosun chair which Mr. Landry was using at the side of the building to install the cable previously mentioned. It would appear also that the contractor (Luktor) had failed to safely anchor the worker's rope that was to secure Mr.

Landry or to provide a separate "life line". As a result, Mr Landry fell some thirty feet and was injured.

[7] The two health and safety officers (Montrose and Bhullar) arrived at the scene around 14:30 pm on the day following the accident (September 9) to begin their investigation. They were met by two British Columbia Work Safe officers (BC HSOs) who had already initiated their own investigation into the occurrence since Luktor, being involved in construction, was perceived to be an undertaking within provincial jurisdiction.

[8] The two *Canada Labour Code* HSOs (Montrose and Bhullar) received statements solely from the provincial officers, and were allowed access to the roof of the building where the accident occurred by the provincial officers, took pictures and listened to their description of the occurrence. In the days that followed, HSO Ryan became involved and together with HSO Bhullar, conducted an investigation into the jurisdiction applying to Luktor Contracting Inc.

[9] In a letter to Luktor, dated September 19, 2011, HSO Ryan stated that Luktor was not subject to federal jurisdiction for the purposes of labour legislation and that thus, would not come under the application of the Code. The HSO expanded somewhat on the rationale for her conclusion as follows:

> The installation work that your company does at this time,(sic)is not considered integral to the operations of a telecommunications company. Should your services expand or change substantially in the future, the jurisdiction may change. Currently, provincial labour and health and safety laws apply to your company because it is engaged in a construction activity, which falls under provincial jurisdiction pursuant to the Constitution Act, 1867.

[10] Given the last sentence of the HSO's above reasons, it does appear that HSO Ryan adhered to the general rule derived from the separation of powers in the *Constitution Act,1867* (also known as the *British North America Act, 1867*) that sees construction work associated with general provincial authority over property and civil rights, as opposed to specific heads of federal authority at section 91 of the same statute, all this giving credence to the generally accepted maxim that where labour relations, of which occupational health and safety is part, are concerned provincial authority is the rule and federal authority the exception.

[11] In her report concerning the direction issued on September 22, 2011, HSO Ryan indicated that the BC health and safety officers that her colleagues met at the site of the accident were not prepared to release specific details regarding the accident. However, they apparently expressed concerns regarding the inadequacy of the selected anchor points, the fact that Luktor employees were working on the edge of the roof without fall protection, as well as the fact that the injured employee was working in a bosun's chair without an independent lifeline. That being said, the report by officer Ryan indicates that she conducted her inquiry in order to evaluate whether Rogers was meeting its Code

obligations with respect to "every person granted access to the work place", which would be the basis for the application of the obligations officer Ryan eventually identified as being contravened.

[12] HSO Ryan arrived at a number of conclusions, starting with identifying Rogers Communications Inc. as the employer, without, however, specifying of whom the undertaking is the employer, at least within the circumstances of the present case.

[13] According to the HSO, there are numerous entities, historic and present, that have interests in the works performed by contractors and the work place where the accident occurred. As such, *vis-à-vis* the actual roof top emplacement, Microcell Connexions was signatory on the original lease agreement entered into with the owners of the actual building. Microcell then became Fido which has now become part of the Rogers Communications group of companies. This would thus make Rogers the parent company with a stake in the various subsidiaries and HSO Ryan's report states in this regard, surprisingly enough given that the direction and the investigation concerned a single set of circumstances, a single contractor and a single site, that the purpose of this initial direction was to ensure that all of the federally regulated entities (presumably related to Rogers) were compliant since, to quote HSO Ryan, "the inadequacies (in terms of ongoing controls) did not appear to be limited to this project or contractor".

[14] The continued investigation, that bore primarily on the question of the "granting of access" to the roof top that led to the identification of five additional contraventions and the issuance of a second direction (October 28, 2011), saw HSO Ryan formulate a number of additional conclusions. She found that Rogers did not have sufficient controls in place to meet a number of their obligations under the Code with respect to the contractor and the contractor's employees working on the rooftop at 206 East 49th Avenue, Vancouver.

[15] The extent of Roger's contractor safety program was that they collected information from the contractor when they were first engaged with no follow up. Contractors were advised to comply with all federal and provincial health and safety requirements on each project, but according to the HSO, no specifics were given and no site specific safety information was conveyed to the contractor. She notes however that "very specific" information was transmitted about access to the site. On this latest point, the HSO report includes a document, in fact a sheet of paper titled "Site Directions" for the address where the accident occurred. The document, which HSO Ryan states is transmitted to the contractor, as similar ones would be to other contractors at other sites, provides very specific directions on how to reach first the building through various city streets and then the rooftop from within various parts or sections of the building.

[16] What can be clearly derived from that abovementioned document is that there would be no one from Rogers to receive the contractor and its employees at the site, thereby explaining the amount of detail spelled out by the document in question. The HSO also notes that there was no monitoring by Rogers of the contractor's program, training records, or records for equipment and that while Rogers has Implementation

Specialists whose responsibility it is to oversee the projects, they receive no training in hazard recognition and their job description does not include responsibility for safety on the project.

[17] Furthermore, Officer Ryan indicated that Rogers did not monitor the contractor with regard to occupational health and safety, nor did they provide fall protection equipment or ensure that it was used, and they gave no instruction regarding the selection or use of anchor points. Additionally, still as described by HSO Ryan, Rogers did not ensure personal protective equipment was maintained, inspected and tested in accordance with prescribed standards.

[18] As stated above, I conducted a telephone conference with HSO Ryan and counsel for the appellant. The purpose of this conference, which was held on April 11, 2012, was to allow HSO Ryan to explain the conclusions of her report and possibly expand somewhat on the views she expressed regarding a certain number of subjects germane to the present case. This teleconference was intended to replace the customary appearance of the HSO as a witness at the usual form of hearing. In this case, I sought to hear HSO Ryan on the notions of "employer", "access" and "control" relative to Rogers and the site of the accident.

[19] On the notion of "employer", a defined term in the Code, HSO Ryan recognized that Rogers was not the employer of the Luktor Contracting Inc. personnel that was involved in the work being conducted at the accident site, but maintained that Rogers, a federal undertaking with employees of its own, was to be perceived in that capacity as the employer who granted access to the site to the employees of Luktor, although on the day of the accident, there were no employees of Rogers proper on site. She did state however that there could have been employees of Rogers at the site at some point in time during the execution of the project. She pointed out however that she had not visited the site nor had she interviewed anyone who could or would have been at the site at that time. She also reaffirmed her conclusion that Luktor, because of the nature of the work it was involved in, which was neither vital nor essential to the activities of Rogers or continuously involved in communications work, would come under provincial jurisdiction.

[20] On the question of "access" to the site or the work place, she simply reiterated her conclusion that Rogers, being an "employer", had granted access to the Luktor employees. When asked what the consequences of this could be in terms of the obligations applicable to both pursuant to the federal and/or the provincial regulations, where the provincial jurisdiction employer being bound by provincial legal requirements could possibly be required to abide by federal rules, having been granted access to a site "operated" by a federal employer, HSO Ryan stated with little explanation that where there would be differences between the two enforceable legal systems, she would not find fault if Rogers, although bound by federal legal requirements relative to health and safety, sought or accepted compliance with standards superior (meaning provincial) than federal standards.

[21] Officer Ryan did point out however that she did not know whether Rogers and/or Rogers employees have free access to the roof of the building where the accident occurred. She did note that whenever anyone seeks to access the roof, they have to go through what she described as a process, this in fact being the very specific directions from which street to arrive on, where to go, what doors to go through, stairs to take and ladder(s) to use, where Rogers employees could obtain keys, etc., previously mentioned. Although officer Ryan initially stated not knowing whether Rogers employees have free access to the roof of the building involved, she went on to state that those employees as well as other parties (contractors or employees of other entities having equipment on the same roof) would need to go through that same process and abide by the conditions set in the Right-of-way agreement(s) entered into with the owners of the building.

[22] Finally, on the question of "control" over the site which she described as a work place, HSO Ryan stated that the legislation must receive a broad interpretation and that as such, given the Right-of-Way agreement with the owners, the fact that Rogers is the party awarding the work order to the contractor, the additional fact that Rogers effectively acts as project manager in that its employees inspect the completed work although they are absent when the work is being done, and finally because Rogers provides the information/directions on accessing the roof and makes arrangements with the landlord/building manager to allow/obtain access to the building and the roof, she stated the opinion that Rogers exercised "certain controls", which, it would appear, she felt satisfied the "control " over the work place requirement stated in the preamble to section 125 of the Code.

Issue(s)

[23] Stated generally, the sole issue to be considered is whether, pursuant to the Code, there was a legal foundation for the issuance of the two directions being appealed. However, as the directions were issued pursuant to subsection 145(1) of the Code on the basis of contraventions identified by HSO Ryan to a number of provisions of the Code and its Regulations by Rogers, one should be more specific and thus identify the issue(s) as whether a contravention or contraventions to the Code occurred. As the contraventions identified by HSO Ryan were stated by the HSO to have been to subsection 125(1) of the Code, this will require considering first the questions of "control" and, if necessary, of "the granting of access" to the site identified by the HSO as a work place, and the resulting consequences as to the applicable legislation.

Submissions by the appellant

[24] As stated previously, the entire evidence advanced by the appellant in support of its position can be found in an affidavit (with supporting 44 documents) sworn by an employee of the appellant, one Alex Vlach, who was the civil project coordinator of the project involved in this particular case. Given the fact that this hearing is solely by way of written submissions, save for HSO Ryan taking part in the teleconference previously mentioned, the evidence derived from Mr. Vlach's affidavit will not have been tested through cross-examination. Counsel for the appellant has summarized the facts that can

be derived from that lengthy document which he premised by a brief outlook of the position the latter is taking in this appeal.

[25] As such, the appellant considers that what is at issue in the present case is the extent, if any, for Rogers of the obligations in subsection 125(1) of the Code and related regulations in circumstances where, generally speaking ;

- a federal employer (Rogers) has a non-exclusive right of way for limited purposes to a part of a building's rooftop where it has contracted for work to be done;
- said federal employer has a non-exclusive license to access said rooftop;
- the building's owners, which is not Rogers, and others have access to said rooftop;
- the appellant Rogers infrequently attends the said rooftop;
- the appellant has retained a provincially regulated company to perform work within that company's scope of expertise and outside the scope of expertise of the appellant;
- the provincially regulated company committed health and safety violations which were the direct cause of the accident that occurred on the said rooftop;
- the provincial regulator has investigated and issued orders against the provincially regulated company for the violations that caused the accident;
- the alleged contraventions of the Code and of the related regulations are mandatory obligations that would require appellant Rogers to intervene in the provincially regulated contractor's operations and its relations with its employees.

[26] With the above as background, counsel for the appellant has indicated that its argument will rest on the three following points. First, the appellant contends that section 122.1 of the Code states that the purpose of the legislation is to prevent accidents occurring in the course of employment to which the Code applies, a fact the appellant contends is not the case here since the injury occurred in the course of employment to which the provincial code, the B.C. *Workers Compensation Act* finds application, and that as such, HSO Ryan's directions have the effect of imposing obligations on a federal entity over matters which fall directly or indirectly in provincial jurisdiction.

[27] The gist of counsel's argument on this is that statutes must be interpreted in a manner consistent with the division of powers found in the Constitution and that it is well established that where labour relations are concerned, which includes occupational health and safety, exclusive provincial competence is the rule and federal competence the exception, these general principles of constitutional law thus necessarily influencing the interpretation that subsection 125(1) of the Code should receive and rendering applicable to this case the interpretive principle of "reading down" which would require the interpretation of subsection 125(1) to be narrowed to exclude applications that although grammatically possible, would violate constitutional norms. In short, counsel considers that subsection 125(1) should be read down to not apply to the appellant requiring it to interfere with a provincial company and its employees.

[28] The appellant argues in the alternative that to fall within the scope of subsection 125(1), it has to have "control", or as per the French text of the legislation, "*l'entière autorité*" over the rooftop that was the work place where the accident occurred, which it did not, because Rogers merely had a non-exclusive right of way to access the rooftop and to place microwaves and related equipment on the right of way portion of the roof.

[29] The appellant further notes that it did not have control given that the French language version of subsection 125(1), requires "*entière autorité*" and is a stricter or narrower requirement that the "control" requirement in the English text of the provision. Considering the principle of bilingual statutory interpretation, the appellant indicates that where one of two versions is broader than the other, the more restricted or limited meaning is to be applied, such that the appellant did not have "*entière autorité*" or even "control" over the rooftop.

[30] The appellant also points out that it did not have control by indicating that interpreting subsection 125(1) as the HSO has leads to an absurd result, thus violating the rule of statutory interpretation that interpretations that lead to "absurd" results should be avoided. Interpreting that provision to require the appellant to be responsible for matters that it has no right or power to control is an absurd interpretation that needs to be avoided.

[31] HSO Ryan concluded that Rogers had violated the Code by failing to provide Luktor's employees with safety materials, equipment, devices and clothing where Rogers has neither the jurisdiction to intervene in Luktor's working relationship with its employees nor the expertise to determine what safety materials, equipment, devices or clothing would be appropriate.

[32] Moreover, the requirements for specific equipment in the Code are not identical to the requirements under the provincial legislation applying to the contractor, and the effect of HSO Ryan directions' would be to impose two different and potentially inconsistent sets of requirements for said equipment to be used by the provincial contractor, something that ought to be left to the responsibility of the contractor retained by the appellant for its expertise to provide its employees with the appropriate material.

[33] Should any of the previous arguments not be retained by me, the appellant maintains that it did act in a diligent manner and complied with the sub-provisions of subsection 125(1) and the regulations cited by HSO Ryan in her directions. It is the position advanced by the appellant that the facts of the case would support the arguments mentioned above and in its written submissions, the latter described those facts at length.

[34] While I have had occasion to read and thus become fully cognizant of this descriptive, it is not necessary to repeat it hereafter at length, although what follows is taken from the evidence submitted by the appellant and constitutes as exhaustive a description as necessary for me to arrive at a conclusion upon taking into account the arguments formulated at length by counsel.

[35] The appellant, Rogers telecommunications Inc. provides in part both wireless and wireline telecommunications service to customers across Canada. It does not however have the expertise required to install wireless and wireline telecommunications equipment and it does not operate such a business. Rogers does have some wireless telecommunications equipment on the rooftop of 206 East 49th Avenue, Vancouver, where the accident occurred, as is also the same situation for 3982 other towers and 1675 other roof tops across Canada where it has such equipment installed.

[36] The services of Luktor Contracting Inc., employer of the injured employee, had been retained, as had often been the case in the past, to install a communications tower on the rooftop of the above mentioned building and while the appellant may not have been aware of any past safety issues relative to that particular party, in this particular instance it has determined, as has the HSO, that failure to safely anchor the worker's holding rope and the subsequent accidental cutting of said rope by another worker brought about the fall of the injured worker.

[37] The building where the accident happened is not owned by the appellant. It is a four storey mixed use residential and commercial building with the ground floor containing various businesses and the three floors above street level being residential condominium units. The appellant has access to two separate areas of the building, namely, areas on the ground floor for equipment storage, and the rooftop, or part thereof where its towers are installed as per an agreed right-of-way concluded with the owners of said building.

[38] According to the affidavit by Alex Vlach, the appellant does not have exclusive use of and access to the building's rooftop, nor does it have the ability to control all use of or access to said area, and itself accesses said rooftop only infrequently to facilitate the installation or maintenance of its equipment. For their part, the contractors, such as Luktor, whose services have been retained by Rogers to be performed at the roof top, they have independent access to it by way of being provided with written directions on reaching the building and the rooftop and a key to such by the appellant, as previously stated. Their services to Rogers however are performed without Roger's employees or representatives being on site.

[39] On the same roof top, there is other satellite communications equipment that does not belong to the appellant and other tasks that need to be executed there, such as rooftop maintenance, skylight cleaning and window washing, all requiring access by persons other than the appellant's employees and/or representatives.

[40] The appellant has access to the building's roof top to install and maintain antennas and other telecommunications equipment, with transmission lines connected to the roof top equipment running through the staircase section of said building to a ground area described as the North fenced compound as well as to a suspended platform at the rear of the building. The actual access to the site by Rogers' employees over a year is very limited. On the one hand, Operation Technicians work on the appellant's radio equipment when problems arise as well as for routine maintenance, and they typically attend at that

place between two to three times per year, with their visit to the rooftop or the ground floor of said building typically lasting one to three hours.

[41] On the other hand, Rogers' Civil Project Coordinators (or Civil Project Specialists) such as Mr. Vlach coordinate the civil installation and construction of equipment at said building by either managing contractors going to said building , or by coordinating the civil installation/construction of equipment with a Technical Project Coordinator who interfaces with contractors doing technical installations. These employees would go to this site approximately two to three times a year to assess site conditions or become familiar with the installation to be performed by a contractor. Such a visit would typically last an hour.

[42] In total therefore, it would appear that in a typical year, Rogers' employees would attend at the roof top from a minimum of four to a maximum of twelve hours, and at ground level for a total period of time in the range of 16 to 54 hours in a year. Access by the appellant to the building generally and to those specific areas of the ground floor as well as the roof top is governed by a contractual right-of-way with the owners of the building which originally provided the appellant with unobstructed access to a designated area as well as a licence to ingress and egress for the purposes set out therein and for a specified annual fee. This right-of-way has been amended over the years, but in essence it still governs access, ingress and egress to a number of specified areas, including one on the side of the building, with the area on the roof top comprising significantly less than fifty percent (50%) of the space on the roof top of the building.

[43] Although being part to this right-of-way agreement with the owners of the building, the evidence has also shown that where the appellant seeks to have installation or construction work executed by contractors on the roof top, it must first seek and obtain approval from the owners relative to the type of construction work to be effectuated, the nature of the equipment to be installed, the extent to which the portion of the roof top allotted pursuant to this right-of-way agreement will or could be affected and whether it need be varied, the length of time required for such work, the impact of such work on the building and its occupants, the identity of the party or parties mandated by the appellant to effectuate those tasks and where required by circumstances, the needed additional payment(s) to the owners to proceed with some of those tasks.

[44] Contractors whose services are retained by the appellant to do work on the roof top of the building perform, as needed, a number of different services ranging from installation and maintenance of equipment to trouble-shooting and restoration of services of said equipment. According to affiant Vlach, as a rough estimate, in any given year anywhere from five to ten contractors may be called to work for Rogers at the roof top with the length of their visits, either cumulatively or separately possibly exceeding the hours actually worked there by Rogers' own employees.

[45] In the case of contractor Luktor's work of wireless and tower installation, it was first hired in 2007, at which time it provided the appellant with a number of documents destined to establish its capacity to execute work safely. Those were a Work Safe BC

clearance letter, training records regarding fall protection training from Hazmasters for its employees, a completed health and safety contractor compliance program and the contractor's occupational health and safety policy.

[46] On November 1, 2008, Rogers and Luktor entered into a three year Master Construction and Implementation Services Agreement, the purpose of which was to retain Luktor, as the contractor, to perform certain construction services for Rogers, more specifically to provide "Rogers and its affiliates with construction and implementation service activities, including but not limited to wireless installations". While the agreement is quite comprehensive, certain provisions are of more relevance to the position taken by the appellant in this case. As such, Article 3.6 of said agreement states that only the contractor would be responsible for how the work would be carried out.

[47] Article 3.6 reads as follows:

> [N]either Rogers, nor the Construction Specialist [a Rogers employee] shall be responsible for control or charge of Contractor's construction means, methods, techniques, sequences or procedures, or for safety precautions and programs required for the Services in accordance with the applicable construction safety legislation, other regulations or general construction practice. Neither Rogers nor its Construction Specialist shall have responsibility for or have control or charge over the acts or omissions of Contractor, Subcontractors, suppliers or their respective agents, employees or any other person performing any portion of the Services.

[48] On the question of safety, the agreement provides that Luktor would be responsible for construction safety and would comply with all health and safety legislation and regulations. Of particular interest in this respect, Article 7.3 reads in part that the:

> [c]ontractor shall be solely responsible for construction safety at the Site and for compliance with all rules, regulations, policies, practices and guidelines required by the applicable construction health and safety legislation and or government agencies or bodies at the Site [including] (3) ensure that the health and safety of all workers performing any Service is protected and (5) direct and control all of the Services in a safe manner.

[49] It is within the scope of that agreement that the services of Luktor were retained by Rogers as part of its Spring 2011 technological upgrade plan to install LTE equipment at approximately 343 existing locations throughout British Columbia, said services of the contractor being secured through the requisitioning by Rogers of an open purchase order for time and material. That purchase order, initially dated Jun 20, 2011, which would eventually be modified a number of times as the evaluation of site, work and equipment would be carried out by the contractor as per the approval process put in place by Rogers, stated at Article 7.0, under title "Health and Safety", that the "Seller and Seller Representatives shall perform the Services for Rogers in a safe manner and in accordance with applicable health and safety legislation."

[50] In order to facilitate the Contractor's provision of the services required pursuant to the initial (and subsequently amended) purchase order, the appellant produced a real estate work order, which is the document that the appellant's Real Estate Department uses to obtain applicable approvals from the building owners to have the work approved.

[51] To this end the appellant also obtained the site audit completed by the contractor of the work to be performed on the roof top. Under the Master Construction and Implementation Agreement mentioned at paragraph 15 above, a contractor whose services have been retained to do work at a certain location must perform a site audit prior to commencing work at the location.

[52] In doing the above, the contractor makes a full assessment of the site, including an equipment count, equipment location, power capacity, space available, structural integrity of site of existing antenna mounts, etc., for the site. The contractor also takes photographs of the site.

[53] Additionally, during such audit, the contractor is required to bring an electrician, as well as a structural engineer, to visit the site to assess capacity of the site and see if contractor can handle the equipment required to be installed. While the site audit for the site involved in this case was performed as stipulated, the appellant did not attend the site audit conducted by Luktor.

[54] Other actions taken by the appellant pursuant to the initial purchase order included issuing civil work orders and microwave work orders to the contractor; releasing the materials (antennas, radio, cable, etc.) to the contractor for installation; and requiring the contractor to provide a work schedule so that it could provide the owners of the building with advance notice of the actual execution of the work.

[55] The contractor did not begin the physical installation of the equipment on the building's roof top until after August 31, 2011. On August 30, 2011 however, Alex Vlach, the Civil Project Coordinator informed the building's owner representative as follows:

> This is to provide notification of our schedule for next week. Our authorized contractor is "Luktor Contracting Inc.", they will be on site starting Tuesday, Sept 6, at 9:00AM and should have all the work completed by Monday, Sept. 12. The working hours are 9:00AM-5:00PM, this includes the weekend of Sept. 10-11 […].

[56] As indicated previously, the accident occurred on September 8, 2011. The contractor has not performed work at the building or the building's roof top since the occurrence. On September 9, 2011, thus the day following the accident and prior to HRSDC HSOs having conducted an investigation, Luktor received WorkSafe BC orders for the work place accident. Specifically, Luktor was found to have been a prime contractor for purposes of the work performed by the latter at the building's roof top and eleven orders were issued to it by the provincial health and safety officers, those mostly relating to the contractor's failure as it related to a fall protection program.

[57] The appellant's evidence concerning its involvement with the performance of the contract work is to the effect that the appellant does not supervise civil installation work performed in situations such as those of the present case and Rogers did not supervise the work executed on the building's roof top.

[58] The appellant also maintained that Civil Project Coordinator Vlach was the only appellant representative who physically attended the building in relation to Luktor's services. He attended the site twice. On one occasion, on or around April 13, 2011, thus much time prior to Luktor beginning to execute the work, he went to confirm the location of some equipment (Inukshuk) and this lasted for approximately 15 minutes. On the second occasion, on or around August 26, 2011, again before physical work at the site began, he met with the owners' representative and the contractor's foreman to discuss the location of a cable tray, said meeting lasting approximately one hour.

[59] Further speaking to its involvement in the performance of the contract work, the appellant noted that no appellant employee has ever been or been required to install any equipment on the building's roof top or at the side of said building. Said work is performed for the appellant by contractors such as Luktor.

[60] Further to the point of its involvement in the contract work, the appellant asserted that the building and the building's roof top were used for a variety of purposes, not all of which is related to the appellant. There is satellite equipment at the site that does not belong to the appellant, as well as several skylights on the building's roof top.

[61] It was also indicated by the appellant that this satellite equipment was not installed by the appellant, and thus must have been installed and presumably is serviced by others. Similarly, the skylights are washed periodically by others. All of these other companies and their workers would thus have access to the roof top as required for their purposes, without notifying or obtaining the permission of the appellant. The owners of the building, on the other hand, have unrestricted access to the site as they see fit, without notifying or needing the permission of the appellant. As such, the appellant does not have exclusive rights over that site or work place.

[62] The evidentiary elements mentioned above have brought the appellant to argue that the directions issued by HSO Ryan should be rescinded. The appellant suggests that I should reach this conclusion based on a number of considerations, the first of which being constitutional considerations impacting on the interpretation that must be put on provisions of the Code.

[63] Counsel for the appellant has also presented me with a lengthy submission relative to section 122.1 of the Code, the purpose clause which states that the Code's purpose is to prevent accidents occurring "in the course of employment to which the Code applies". The appellant submits that this reflects the constitutional imperative that federal legislation applies to federal undertakings and not to matters under provincial jurisdiction, except perhaps incidentally, or, as established by a long established body of constitutional case law, that in matters relative to labour relations, such as occupational

health and safety, provincial jurisdiction is the rule and federal jurisdiction is the exception on a proper interpretation of the constitutional division of powers between section 91 and 92 of the *Constitutional Act of 1982* (or *British North America Act of 1867*).

[64] In the present case, the appellant notes that the injury occurred in the course of employment to which the provincial legislation applies, not the Code. Thus, while there is no doubt for the appellant that the Code applies to the latter in its operations, insofar as they relate to a section 91 constitutional federal power, it does not apply to matters clearly under provincial jurisdiction.

[65] The appellant also referred to the well established principle that calls for statutes to be interpreted in a manner consistent with the division of powers found in the Constitution, since constitutional law prevails over all other sources of the law and thus, given the hierarchy of legislation in Canada, the "lower" laws, meaning legislation (statutes and delegated legislation), common law and international law (international agreements and customary law), must be interpreted consistently with those that are superior in the hierarchy.

[66] The appellant thus has submitted that when considering the meaning of the phrase "every work place controlled by the employer" found in the preamble paragraph to subsection 125(1) of the Code, said provision serving as the basis for the contraventions retained by HSO Ryan in the issuance of her directions, I must have reference to the division of powers, and construe the term "work place" controlled by the employer, in this case the appellant, in light of the constitutional context surrounding the regulation of labour, employment and occupational health and safety, which means that the Code must be interpreted in a manner consistent with the Constitution.

[67] Regarding the circumstances of the present case, the appellant has submitted that the contractor, Luktor, operated under provincial jurisdiction, doing construction and installation work that falls under provincial jurisdiction and thus is not integral to the federal head of power attaching to the activities of appellant Rogers.

[68] The appropriate response, in the present circumstances of this case, would consequently be to restrict the federal legislation, or rather its application, to a constitutionally permissible scope, so as to avoid interference with matters proceeding under provincial jurisdiction and consequently uncertainty.

[69] According to counsel for the appellant, as would be the result in the present case if the directions are allowed to stand, the intervention of the federal government in the affairs of provincial contractors would lead to a patch work of regulations, and great uncertainty as to the standards that had to be met and applied in the course of work carried on in a province. It could subject certain work place conduct to both federal and provincial jurisdiction with the risk of being subject to inconsistent directions and processes.

[70] By way of example, the appellant notes that HSO Ryan found that the appellant, at a work place under its control, was in violation of paragraph 125(1)(l) of the Code for failing to "provide every person granted access to the work place by the employer (appellant) with prescribed safety materials, equipment, devices and clothing." If that is interpreted to require the appellant to give safety equipment to each Luktor employee, there is a real risk of confusion in the work place by the two employers having different views of the proper safety equipment to provide, and the possibility of the provincial and federal authorities reaching different decisions, or being subject to different legislative requirements, on what equipment was required.

[71] In short, subjecting construction work, as would be the case here for Luktor, to federal or provincial regulation, or both, depending upon who a company's client happens to be on a given day would not allow the constitution to be applied with any degree of continuity and regularity.

[72] The appellant is thus of the view that the constitutional context discussed above serves to support the appellant's following submission. As the work of Luktor falls under provincial jurisdiction, federal legislation should not be construed so as to permit or require a federal employer to intervene in provincial labour relations. Thus, the words "every work place controlled by the employer, in the federal legislation that is the Code, should not be construed so broadly as to encompass affairs that are provincially regulated; it should be limited to the activities of the appellant's employees, or properties owned or so clearly controlled by the appellant that it is beyond doubt that the place, and the work and workers therein, is a federal undertaking which falls within the "integral part" of the appellant's federal undertaking.

[73] While there can be no doubt that the appellant is expressly subject to the Code with respect to its own employees, the question in the present case is whether that jurisdiction should be extended to include operations carried out by provincial contractors on its behalf. The directions issued by HSO Ryan require the appellant, among other things, to provide every person granted access to the site with certain equipment, and ensure that every person granted access to the site is familiar with and uses in the prescribed (by regulations taken under the Code) circumstances and manner all prescribed (*idem*) safety materials, equipment, devices and clothing.

[74] For the appellant, "ensure" means to make something certain to happen, to guarantee, and to do that, the "ensurer" must have power over that employee. The HSO's directions presume the appellant has the authority to work with and direct the contractor's employees. That is not the case. It is constitutionally ill conceived and unworkable to require Rogers to intervene in Luktor's labour and occupational health and safety matters. In fact, counsel for the appellant maintains that it is possible that requiring an employer who lacks expertise in the area to identify appropriate safety equipment and require workers to use it could be dangerous.

[75] Further, when considering the words "every work place controlled by the employer", the constitutional framework discussed by the appellant ought to be borne in

mind as an aid to interpretation, and a result consistent with it should prevail. The exercise of federal jurisdiction over the activities of provincial contractors retained by a federally regulated entity cannot be seen as "integral to Parliament's exclusive jurisdiction" over that entity.

[76] As previously stated, the appellant has buttressed its arguments on a large and well established body of constitutional precedents and writings, for a great part influenced in some manner by the Supreme Court of Canada decision in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, and principally on the following words of Beetz J., at page 776:

> Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.

[77] The appellant expresses the view that the solution or remedy to the difficulty created first by the directions, but in reality by the wording of the Code, would be to resort to the canon of statutory interpretation of "reading down" the statutory language so as to avoid such unacceptable result created by the directions. According to *Sullivan on the Construction of Statutes*, 5th ed., at page 465:

> Courts often rely on reading down to give effect to the presumption of compliance. In reading down, the potential scope of the legislation is narrowed to exclude applications that are grammatically possible but are considered unacceptable for one reason or another-because they exceed the purpose of the legislation or contradict other legislation or lead to absurdity or violate a constitutional limit or norm [...]. [My underlining]

[78] On this, the appellant also refers to Hogg, *Constitutional Law of Canada*, whose words are to the same effect as the previous citation and thus need not be cited here. For the appellant, the doctrine of reading down would simply constitute the means of direction so as not to apply the provisions upon which the directions are based to workers subject to provincial jurisdiction or where compliance would require a federal employer to interfere with provincially regulated workers.

[79] The second part of appellant's argument concerns the meaning to be put on the word "control" found, as previously stated, in the preamble to subsection 125(1) of the Code. The appellant claims it does not have or exercise control over the roof top that it refers to as the work place, thus leading, if found correct, to the quite right conclusion that none of the directions issued by HSO Ryan, have any legal foundation. The appellant

submits that the French version of subsection 125(1) makes it clear that the work place was not a work place controlled by the appellant for the purposes of the Code.

[80] This argument is built on the bilingual text of the legislation, particularly subsection 125(1) listing the specific duties of the employer, and the appellant's contention that where the English text uses the term "control", the French text speaks of "*entière autorité*", which counsel for the appellant has literally translated as "entire authority".

[81] The appellant has referred to the Multi Dictionnaire de la Langue Française to define the word "*autorité*" as " *pouvoir ou droit de commander* (power or right to command others), or "*ascendant par lequel une personne se fait obéir*" (power over other persons or the ability to get them to obey) and thus, without offering a definition of the English word "control", formulate the opinion that the English and French texts of subsection 125(1) differ from one another because of a difference in the scope of the language, that difference being that the English text requires "control" over the work place, and thus is broader, while the French text is narrower in that it requires "*l'entière autorité*" (entire authority) over the work place.

[82] Citing *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, where the Court stated that "[f]urthermore, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning" as well as *R v. Daoust*, 2004 SCC 6, where Bastarache J. stated "If neither version is ambiguous, or if they both are, the common meaning is normally the narrow version" and, quoting an author, added: "There is a third possibility: one version may have a broader meaning than the other, in which case the shared meaning is the narrow of the two", counsel summarized his argument as follows.

[83] In the present case, the French version, which creates the obligation on the employer for any work place placed under the authority of the employer, is a clearer and more restrictive version compared to the English "work place controlled" by the employer. According to the principles of bilingual statutory interpretation, the French version best reflects the common intention of the legislator found in both versions. The work place in this case is not under the "*entière autorité*" (entire control) of the appellant.

[84] The appellant has non-exclusive access to the roof top and the right to have antennae and other such telecommunications equipment on site. Other persons such as contractors, the owners of the building and maintenance providers, may all access the site without notifying the appellant or obtaining permission from the appellant. The limited, non-exclusive interest of the appellant cannot be described as having "*l'entière autorité*" (entire authority).

[85] Indeed it cannot meaningfully be described as constituting "control" of the site. As the threshold requirement of "control" or "*entière autorité*" required under subsection 125(1) of the Code is not present, the appellant's view is that the directions are ill-

founded and should be rescinded.

[86] As a final point of argument, the appellant has advanced that to accept the interpretation that would be at the basis of the issuance of the directions by HSO Ryan, would sanction an absurd result, and that statutory interpretations intended to avoid such absurd results are consistent with the concept of interpretation to promote the legislative purpose of the Code.

[87] Noting absurdities such as contradiction and internal inconsistency, pointless inconvenience or disproportionate hardship that would derive from a strictly grammatical interpretation of the legislation, need to be avoided as leading to unintended consequences, the appellant has referred to *Sullivan on the Construction of Statutes*, 5th ed., stating that:

> […] consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity.

[88] In referring to the various directions by HSO Ryan, all based on control over the work place and requiring the employer to do a number of things relative to persons granted access to the work place that do not come within the jurisdictional coverage of the Code, that appellant succinctly states that a direction requiring the appellant to do things that it does not have the authority to do, such as direct Luktor's employees or provide equipment to workers under the direction or control of another employer or that are outside federal jurisdiction would constitute just such an absurdity that must not be supported. Alike, a direction that would result in contradicting provincial legislative or regulatory requirements would also constitute an absurdity to be avoided.

[89] All in all, the appellant summarizes as follows. There is no dispute that in regards to the incident that gave rise to HSO Ryan's two directions, the appellant can only fall under the scope of subsection 125(1) if it is demonstrated that the appellant had control (*entière autorité*) over the work place. This is because the incident did not involve tasks performed by an employee of the appellant. Rather, the incident related to tasks performed by and under the authority of the contractor and its own workers.

[90] Therefore, the question becomes: did the appellant have "*entière autorité*" over the work place as required by subsection 125(1) of the Code or, using the English text of the legislation, did the appellant have "control" over the said work place, and in answering that question, the appellant fashions its argument on the English less demanding test or threshold "control" which is therefore more difficult for the appellant to satisfy, even though its position is that the French language "*entière autorité*" prevails. In short, if the appellant can demonstrate that it did not have "control", then clearly it must be found that it did not have "*entière autorité*".

[91] The appellant thus affirms that it did not control the work place as required by subsection 125(1) and thus the threshold requirement for that provision is not met and all findings of contravention pursuant to the HSO"s two directions must be set aside, as all the contraventions listed by the safety officer depend on the appellant falling within the scope of subsection 125(1), which the appellant does not. Alternatively, to the extent the HSO directions would require the appellant to intervene in the contractor's relations with its employees, such interpretation runs afoul of the "Purpose" section (122.1) of the Code and the rule of constitutional interpretation, and creates "absurd results" which require that the directions be set aside.

Analysis

[92] For reasons that I will outline below, I am persuaded that Rogers did not have control over the roof top in question. Given my finding that the employer did not have control over the roof top in the circumstances that led to this appeal, it is my final determination that the HSO's directions are not founded.

[93] From the wording of the main paragraph of subsection 125(1), it is clear that an employer having "control" of the work space is a necessary condition for finding a violation under this section. The provision reads as follows:

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place **controlled** by the employer and, in respect of every work activity carried out by an employee in a work place that is not **controlled** by the employer, to the extent that the employer controls the activity. [My emphasis added]

[94] In the actual factual circumstances of this case, the issue of "control" is raised by the appellant. This issue can be determined on a simple evaluation by me of the facts and circumstances of this case.

[95] I agree with the appellant that the question of "control" is central to the case and that in the absence of "control" by Rogers over the roof top, designated by the appellant as a work place, to the exclusion of the other part(s) of the building where events occurred and where it had equipment, a restrictive designation that I have difficulty in accepting, the obligations on which the directions are founded find no basis and thus no application.

[96] The appellant's argument that it did not have "control" over the work place raises an issue around the bilingual text of the statute, more specifically the preamble to subsection 125(1), claiming that the French text, which uses the words "*entière autorité*" while the English text uses "control", is narrower, thus more restrictive, than the English counterpart and that when one applies the facts of the case to the French criteria, the appellant cannot be seen as having "*entière autorité*" over the work place. In fact, it is the appellant's view that on the facts, it cannot even be seen as meeting the English test of "control".

[97] I do not share the opinion expressed by the appellant that the English and French text of the legislation, on this particular point of "control" have differing meanings. The appellant's position here is based on a single dictionary definition, that of the word "*autorité*" which it has then literally translated into the English "authority", and to which it attached the qualificative "entire" for "*entière*" taken from the French text. That definition, which is from the *Multi Dictionnaire de la Langue Française*, presents "*autorité*" as the "*pouvoir ou droit de commander*" (*l'autorité du patron*, which equates to the English employer's authority) or "*ascendant par lequel une personne se fait obéir*", which the appellant literally translates, not interpret, as "power or right to command others" and "power over other persons or ability to get them to obey".

[98] At the same time, the appellant failed to obtain any definition of the word "control" found in the English text. Proceeding in this manner ignores the fact that legislation is drafted side by side, not one predominant text translated into the other, and that the proper interpretation of a statutory text is consideration of the text as a whole and determination of a proper meaning by resorting to consideration of both equal value texts of said legislation, where there are no obvious contradictions or inconsistencies.

[99] In the case of the words "control" and "*entière autorité*", it is my opinion that if there is a slight difference in meaning, it is such that it is negligible and inconsequent. Be that as it may, although in my opinion a rather less than necessary step, I have nonetheless looked at dictionary definitions of both terms and thus have been comforted in my thinking.

[100] In the same dictionary resorted to by the appellant, the French word "*contrôle*" is defined as "*le fait de diriger, de dominer*" (power to run or manage, to command). What is of interest is that the dictionary states that this meaning is derived from the English language and has now become of normal use. The Canadian Oxford Dictionary defines "control" as the "power of directing, command" and "authority" as "the power or right to enforce obedience", which in essence is an employer's ultimate power to hire and fire.

[101] When all is said and done, one cannot avoid the conclusion that whether the same words are used, or not, whatever minimal distinction can be noted between the two languages of the Code, those are of such minimal impact as to be negligible and inconsequent.

[102] To summarize all that follows, contrary to the position expressed by the appellant, I am of the opinion that the French and English texts of the Code are of one and the same meaning.

[103] Having said this, subsection 125(1) of the Code speaks of two types of "control". First, there is "control" by the employer over the work place, and then, given certain circumstances, there is also "control" over the work activities being carried out by employees of the employer when that employer does not exercise "control" over the work place.

[104] In the present case, as has been made clear by the directions issued by HSO Ryan and also through the latter's expressed opinion and the submissions by the appellant, we are examining solely "control" over the work place since the uncontested evidence is that at the time of the accident, there were no employees of the appellant present and thus no activities of the latter to consider. Section 12 of the *Interpretation Act* was previously cited, and it is not necessary to do so again, except to repeat that said provision does require a fair, large and liberal interpretation to attain the objects of the Code. There is however another provision of the same Act that is relevant to our determination.

[105] Section 10 of the *Interpretation Act* does state that the "law shall be considered as always speaking" and that what needs to be sought is to give effect to an enactment "according to its true spirit, intent and meaning". Now, the purpose of the Code is the protection of persons, physical persons, engaged in work activities in work places, physical places. Given this, "control" cannot be seen as a theoretical concept since it is intended to be exercised on work places or on activities carried out by physical persons. Such "control" then, to be real, needs to be exercised through steps, actions or gestures that relate to the work place. Those however do not have to be carried out exclusively by physical persons. They can also take the form of directives transmitted through various media, including persons. This being said, a number of evidentiary facts must be noted in order to determine whether the appellant exercised control over the site of the accident.

[106] Of the facts outlined above, it is necessary to repeat that generally, the appellant does not supervise civil installation work performed in situations such as those in the present case and that it, through any of its employees, did not supervise the work that was being executed by the employees of Luktor at the time of the accident.

[107] In addition to this, and of even more importance are the following: the building where the accident occurred, and consequently part of its roof top and other areas where Rogers may have had equipment installed, is not owned by Rogers, whose access to those areas, in particular the roof top which is central to this case, is controlled by the terms (against payment) of a statutory right-of-way agreement entered into with the actual owners of this multi-purpose building.

[108] That agreement regulates the proper access and use of the space allotted to Rogers by submitting the installation, operation, maintenance and replacement of Rogers' equipment to owner pre-approval, and in some cases additional monetary charges. Such approval is also required where changes are sought or needed to the space to be used at that site. It has been stated repeatedly above that Rogers does not itself do the kind of work that it had contracted Luktor to do.

[109] Since contractors are used, their presence and that of their employees on site, the work that will need to be done on the building as well as the time and duration of such need to be brought to the attention of the building owners in advance, and one would be justified, in my opinion, to form the opinion that this would not solely be for purposes of informing the owners, but rather to also provide the opportunity to object, refuse or impose additional conditions.

[110] The right-of-way agreement does not confer on Rogers an exclusive access to the roof top and it actually does not have such exclusive access, nor does Rogers have the ability to control access by others to said roof top or, I would add, to other areas of the building covered by the agreed right-of-way.

[111] The presence of appellant's employees on the premises is also an element that must be considered when evaluating the question of control over the work place, because in my opinion, beyond certain conditions and/or obligations that may be formulated in written agreements, where the health and safety at work of persons is concerned, how else can control over the work place be effectively exercised, if not through the presence and intervention of persons.

[112] In the case at hand, since the question centers on the control by the appellant, that would signify persons speaking and acting on its behalf. Now, in this respect, one cannot really speak of the presence of appellant's employees at the work place because they are simply minimally present for their own work for the appellant and totally absent relative to the contract with Luktor.

[113] On this latest point, evidence submitted by the appellant, which is not challenged by the information that is obtained from the HSO's investigation report, serves to demonstrate that employees of Rogers have a minimal presence or attendance at that site, information that is made even more significant by the knowledge that the appellant has equipment installed at 3,982 towers and 1675 roof tops across Canada.

[114] As to the actual building to which this case applies, the employees of the appellant who would attend at the said building, either on the ground level or the roof top, the two areas where the appellant has equipment, are Technical project Coordinators, Operations Technicians and Civil Project Coordinators such as affiant Vlach whose affidavit has been the major source of evidence.

[115] In a typical year, the total yearly attendance time at the ground level by those employees of the appellant would range from 16 to 54 hours, while similar attendance at the roof top of the building would range from 4 to 12 hours yearly. In fact, in any given year, anywhere from five to ten contractors may be called upon to do work for Rogers on that particular building's roof top and the length of their presence there, either separately or cumulatively, may exceed the hours worked at that place by Rogers' employees.

[116] The Code defines "work place" as "any place where an employee <u>is engaged</u> in work" for his employer and thus, for those hours worked by said Rogers' employees just mentioned, the building satisfies the Code definition of federal "work place".

[117] It is debatable however, given the general intent of the Code to govern federal work places and the health and safety of workers coming within federal jurisdiction working there, whether the building, or areas of the building to which the right-of-way agreement applies, would retain the same qualification, which would extend coverage of

the Code when and where there are no employees of Rogers at work, given the stated object or purpose of the Code on a fair, large and liberal construction and interpretation.

[118] This however has not been argued by the appellant. On the question of presence or absence of Rogers employees and the question of control, three points need to be made. First, on access to the building by contractors who perform services for Rogers, including Luktor, they would appear to have independent access by way of being provided with a key by Rogers, if one accepts the statement by affiant Vlach, or with written directions, such as can be found in HSO Ryan's report, as to how to reach the building (address) and circulate in and around said building to reach the ground floor equipment and the roof top.

[119] Notably, no representatives of Rogers are or appear to be present to facilitate that access. With other elements, this serves to demonstrate that contractors can and do perform their services without Rogers' employees or representatives being on site in any capacity. Second, the process in place at Rogers to get work done by contractors at various sites provides that said contractors are provided with a real estate work order, a document used by the appellant's Real Estate Department to obtain applicable approvals from the building owners, with the contractor then conducting an audit of the site where the work is to be done to assess what needs to be done and how, what materials are required, whether the site will be affected and whether arrangements or change that may affect the right-of-way will be needed.

[120] The evidence is that this audit was conducted by Luktor with no participation or presence at any time by Rogers employees. Third, the evidence is to the effect that while Luktor and its employees were conducting their activities at the site, there never were any representatives of Rogers present.

[121] To sum up then, one can conclude that generally for Rogers' general purposes, the presence of its employees or representatives at the site is minimal at best, and as relates to the execution of the contracted work with Luktor, nil.

[122] While Rogers does have equipment installed on the premises, either on the ground floor or on the roof top, the appellant is by no means the sole occupant of these spaces which it shares with others, some apparently involved in similar type of activity and having similar equipment also installed on the premises, and others such as maintenance workers whose services may have been retained by the building owners.

[123] Also, although little or no mention may have been made in the appellant's submission, the building owners obviously would of necessity have unrestricted access to the site. As a consequence, even though Rogers may enjoy access through the right-of-way agreement entered into with the owners of the building, said access being to a specific area or areas, the inescapable conclusion to be derived is that there is shared access, both in terms of equipment and persons, thus meaning that others may access the site and the area or areas without the knowledge of or needing to obtain approval from

Rogers.

[124] I have considered all of the elements cited above, and while taken individually those may not be of sufficient weight to have me agree with the conclusion sought by the appellant, the cumulative effect of all, on the other hand, has caused me to conclude that the appellant did not have control, as envisaged by the Code, of the area or areas described for purposes of this determination as "work place" and to which the right-of-way agreement entered into with the building owners allowed access.

[125] As a result, as properly argued by the appellant, I find that the directions issued to the appellant by HSO Ryan on the basis of paragraphs 125(1)(l), (w) and (z.14) for contraventions to said provisions are not founded.

[126] Although I am disposing of this appeal solely on the basis of my conclusions related to the question of the employer's control of the particular roof top relevant to this appeal, I would like to mention the appellant's other argument against the legitimacy of the issued directions.

[127] The main or central argument advanced by the appellant to challenge the two directions issued by HSO Ryan calls into play considerations regarding the applicability of the *Canada Labour Code*. It brings these considerations into play based on a chosen interpretation given to the purpose section (122.1) of the Code and offered to me as the rightful interpretation of the same.

[128] In light of the appellant's interpretation of the section 122.1 "purpose" clause of the Code, it is argued that the directions, if allowed to stand, more or less would allow an invasion of provincial jurisdiction over labour relations generally, and occupational health and safety in particular, by the federal employer that is the appellant Rogers Telecommunications Inc.

[129] Central to this argument by the appellant is the latter's reference to the *Constitutional Act of 1982* (*British North America Act of 1867*), and the accepted division of federal and provincial powers found therein which has been interpreted and upon which is founded the established and generally accepted principle that in matters relative to labour relations generally and occupational health and safety specifically, provincial jurisdiction is the rule and federal jurisdiction the exception.

[130] For the appellant, application of this principle to the Code generally and its purpose as stated at section 122.1, must result in the rescission of the two directions to avoid the appellant being forced to act *vis-à-vis* contractor Luktor and its employees in a manner that would be tantamount to acting within provincial jurisdiction and thus outside its own and restricted field of federal jurisdiction by directing provincial workers and their employer to abide by certain federal occupational health and safety rules.

[131] The appellant has also buttressed its argument by pointing out that in Canada, there is a hierarchy of legislation, thus in some way an order of importance of legislative

texts, with the Constitution and its separation of powers having supremacy over all other statutory texts, with those needing to be interpreted in line with the statute having supremacy.

[132] There is no question here that appellant Rogers operates a federal work, undertaking or business and that as a consequence, the Code, particularly Part II for our purposes, applies to the latter who is then bound by the employer obligations stated therein and, also, the restrictions found in the Code or derived from its language that may affect the extent of their application.

[133] Section 122.1 of the Code, is central to the arguments formulated by the appellant. It states that the purpose of Part II of the Code "is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies" and, based in part on the considerations raised by the appellant in its submission, the latter has put forth that the directions should be rescinded because they would affect, through obligations put on the federal employer that is Rogers, employment to which Part II of the Code does not apply, since the employees of Luktor, including the injured employee, come under coverage of the provincial legislation because Luktor, as recognized by HSO Ryan, by virtue of its continuous activities, is a provincial jurisdiction employer whose obligations *vis-à-vis* its employees under relevant provincial legislation may vary from those of the appellant under the Code.

[134] Provisions of the *Interpretation Act* (R.S.C., 1985, c.l-21) need also be considered in dealing with the questions raised by the appellant relative to the interpretation to be put on the provisions of the Code relevant to this case.

[135] First, section 12 of that Act provides that "every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", those objects being generally stated in the purpose section of the Code as being the prevention of accidents and injury in the course of employment to which Part II of the Code applies, in the opinion expressed by the appellant, which I share, employment by a federal jurisdiction employer.

[136] It stands to reason that once more, the proper interpretation to be put on this provision is one that adheres to the prescriptions of the Constitution. This being said, the words "employment to which this Part applies" at section 122.1 indicate a general purpose of application where a situation of such employment calls upon the presence of an "employer" and an "employee", two terms that are specifically identified in the Interpretation subsection 122(1) of the Code. I make mention of this because in both cases, those words or concepts that are prevalent all through the Code are defined as being "persons".

[137] In the case of an "employer", it is defined as a "person who employs one or more employees", while "employee" is defined as a "person employed by an employer", underlining in both instances the fact that we are dealing with "persons", but where it is

their qualification as either “employer” or “employee” which are rendered prevalent by the text of the legislation.

[138] While generally speaking the Code imposes obligations on both employer and employee, with section 125 of the Code listing specific duties of the employer *vis-à-vis* “employees”, one can find a few provisions in the Code where it is the concept or notion of “person” which is made prevalent. This is just the case for those provisions of the Code on which HSO Ryan based her directions and where “person” is brought to the forefront in the obligations of an employer *vis-à-vis* a “person” granted access to the work place. Such a difference in terminology brings one to wonder whether the legislator, in those few obligations found at paragraphs 125(1)(w), (l) or (z.14), intended to create an exception to the general employer/employee relationship and the obligations derived therefrom.

[139] This distinction really brings one to the crux of the issue raised in this case, where the HSO’s directions are based on an extended application of the Code in those few provisions and thus would see this legislation applying to any person, coming or not under federal jurisdiction, and where, on the other hand, the position of the appellant would see the Code applying solely to persons, employees or not of the appellant, but operating in and not extending beyond federal jurisdiction. Given what precedes, section 15 of the *Interpretation Act* becomes also relevant. It reads as follows:

> 15(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> (a) as being applicable only if a contrary intention does not appear;

[140] Thus is raised the question as to whether “person granted access to the work place” should be interpreted as being restricted to those coming within federal jurisdiction or not on an exception basis. In my opinion, the position held by HSO Ryan in issuing the directions would appear to be based on an unrestricted meaning put on the word “person granted access to the work place”, thereby opening the door to the situation described by the appellant of possibly extending the application of the Code to another jurisdictional sector and in this manner potentially not respecting the paramountcy of constitutional provisions and their interpretation with a federal employer exercising authority over provincial jurisdiction employees and their employer, an approach opposed by the appellant.

[141] Even though I have already disposed of the appeal based on the ‘‘Control’’ test I wanted to relate the appellant’s other argument as provided in his written submissions because it raises an issue that is reoccurring.

[142] HSO Ryan stated, on the occasion of the telephone conference held with myself and the appellant, that the federal enforcer of the Code would " not find fault" with a federal employer not complying with the provisions of the Code basing the present directions where a provincial employer/employee would be adhering to their provincial rules and requirements and where those would be superior to the federal obligations under the Code and its regulations that an HSO would normally seek to enforce pursuant to the "person granted access" provisions.

[143] That statement left whole the question of "authority" of the federal employer *vis-à-vis* provincial employer/employees, regardless of whether the requirements required to be adhered to would be superior or inferior to the federal ones, although it does go without saying, albeit somewhat simplistically, that a party exceeding prescribed obligations could validly object that it had complied with said obligations.

[144] Although, as previously stated, I considered important to convey the appellant's arguments concerning the applicability of the Code in the present circumstances, I have decided to dispose of this appeal exclusively on the basis of my finding that the appellant employer did not have control of the rooftop in question. Since I have found an absence of this control, and since control is a required element to support a finding that the directions on appeal are properly founded, I am of the opinion that the directions should be rescinded.

Decision

[145] For these reasons, the directions issued to Rogers Telecommunications Inc. by Health and Safety Officer Ryan on September 22, 2011, and October 28, 2011, are rescinded.

Jean-Pierre Aubre
Appeals Officer